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IN THE

Supreme Court of the United States

No. 725

FRANKLIN W. DURGIN and CATHERINE DURGIN, *Petitioners*,

v.

HAL R. STOFFEL, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

FRANKLIN W. DURGIN and
CATHERINE DURGIN, *Petitioners*
Post Office Box 722
Sarasota, Florida

In proper persons

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Arcadia, Florida
Attorney for Respondent

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IN THE

Supreme Court of the United States

No.

FRANKLIN W. DURGIN and CATHERINE DURGIN, *Petitioners*,

v.

HAL R. STOFFEL, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Franklin W. Durgin and Catherine Durgin, respectfully pray for a writ of certiorari to the Florida Supreme Court to review the order of that Court in the above entitled cause.

(a) Reference is made to the following opinions delivered in the Florida Courts below:

Durgin v Stoffel, 126 So 2nd 612

Durgin v Stoffel, 142 So 2nd 373

Durgin v Stoffel, Florida Supreme Court, October 9, 1962

(b) The grounds on which the jurisdiction of this Court is invoked are:

(1) The date of the order of the Supreme Court of Florida is October 9, 1962 and the time of its entry is October 9, 1962.

(2) There are no orders respecting a rehearing or granting of an extension of time within which to petition for certiorari.

(3) The statutory provision believed to confer on the Supreme Court of the United States jurisdiction to review the order in question by writ of certiorari is 28 U.S.C., Section 1257(3).

(c) The questions presented for review are:

(1) Was it denial of due process of law for the lower state court, on plaintiff's motion, to strike from defendants' answer to a mortgage foreclosure complaint averments of fraud, misrepresentation and failure of consideration?

(2) Was it denial of due process of law for the state appellate court after setting a time and place for hearing defendants' interlocutory appeal and listening to the plaintiff's oral arguments at the scheduled time, to outrightly deny defendants any time for oral argument and refuse to listen to defendants?

(3) Was it denial of due process of law for the lower state court to deny defendants the right to amend their answer following the state appellate court's affirmance of the lower state court's order striking defendants' answer but including right to amend?

(4) Did the lower state court deny equal protection of the law by entering a summary mortgage foreclosure decree and awarding plaintiff costs

and attorneys fees with evidence in the record that plaintiff's attorney at time mortgage was was granted guaranteed that defendants would be protected in case survey or abstract of title showed something wrong?

(5) Did the lower state court deny equal protection of the law by holding it would be improper to deny plaintiff's motion for summary final decree of foreclosure because plaintiff did not come into equity with clean hands?

(6) Did the lower state court deny due process and equal protection of the law by entering summary decree of foreclosure in land transaction alleged by defendants in their answer to be fraudulent without requiring plaintiff to place any evidence in the record showing absence of fraud?

(7) Did the lower state court deny due process and equal protection of the law by not assigning a different Judge after defendants made affidavit charging the presiding Judge with showing partiality for the plaintiff and his attorney and with showing antagonism and hostility toward the defendants?

(8) Was it denial of due process for the state appellate court to refuse to certify evidence in the record of the state appeliate court concerning fraud and failure of consideration, for inclusion in the record on appeal to the State Supreme Court?

(9) Was it denial of due process for the State Supreme Court to dismiss petition for writ of certiorari without acting on defendants' motion for inclusion in the record on appeal of evidence

omitted and removed from the record by the state appellate court?

(d) The Constitutional provision is as follows:

Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(e) Statement of the Case:

This case concerns a fraudulent real estate transaction wherein the respondent, Hal R. Stoffel, with the assistance of his attorney, Lewis Purvis, induced your petitioners, Franklin W. Durgin and Catherine Durgin, to pay $5,632.50 and sign a mortgage note for $10,117.50 in exchange for a warranty deed covering 120 acres of land according to the original U. S. Government Survey. At the time he signed the warranty deed, the respondent knew he had possession of not more than 100 acres. The covenants in the warranty deed including the covenant of possession were knowingly and intentionally broken at the time the respondent signed the deed. On May 23, 1960, the respondent filed suit for foreclosure of the mortgage and in their answer, your petitioners averred facts and included documents showing failure of consideration, namely, a shortage of 20 acres out of 120 acres, and fraud on the part of the respondent.

By its order dated June 30, 1960, the lower court struck portions of the answer concerning averments of facts showing fraud, but with leave to amend.

Your petitioners appealed the order to strike but were denied the scheduled twenty-minutes time at the oral hearing before the state appellate court. Thereafter the state appellate court affirmed the lower court order to strike with leave to amend. A rehearing was denied on January 17, 1961, and on January 24, 1961 your petitioners amended their answer consonant with the leave to amend.

On July 6, 1961, the lower court struck out your petitioners' amendment to their answer, denied your petitioners' motion to dismiss on the ground the plaintiff in this foreclosure suit had come into equity seeking relief without clean hands; entered a summary final decree of foreclosure and granted the plaintiff attorney's fees amounting to $1400 — plus interest and costs.

Even though the record shows that the plaintiff admits the amount due was $6,867.50 and that the tract was 20 acres short, the decree required your petitioners to pay $10,827.42 plus interest, costs, expenses and amounts determined by a special master within three days and provided that in default thereof the property be sold at public outcry.

The lower court denied a rehearing and the final decree was affirmed by the state appellate court.

The state appellate court in preparing certified copy of the record to accompany petition for writ of certiorari refused to certify and include the important documentary exhibits showing fraud and failure of consideration.

Your petitioners filed a motion in the state supreme court for conformation of the certified record with the actual record by inclusion of the omitted documentary exhibits.

The state supreme court did not act on the motion but instead denied the petition for writ of certiorari without having the important documentary exhibits in the certified record.

(f) The federal question of due process of law caused by the action of the lower state court in striking from defendants' answer to the foreclosure suit averments of fraud, misrepresentation and failure of consideration, which constituted your petitioners' defense to the complaint was raised in the state appellate court by petition for rehearing interlocutory appeal. Volume 1, page 33 of the record, states in part: . . . petitioners have . . . been denied the right to properly answer a subsequent complaint for foreclosure . . . The affirmation . . . is in direct conflict with . . . Amendment XIV of the Constitution of the United States guaranteeing equal protection of the laws and due process of law . . .

The state appellate court passed on this federal question by denying the petition for rehearing.

The federal question of due process of law caused at the time of hearing of the interlocutory appeal by the action of the state appellate court in listening to the plaintiff's argument at the scheduled hearing and refusing to allow any time and denying hearing to the defendants for answer was brought to the attention of the state appellate court by petition for rehearing. Volume 1, pages 34-35 of the record states in part: Your petitioners . . . right to fair treatment was ignored at the oral hearing . . . when petitioners' time for oral argument arrived, and the Court informed your petitioners . . . that petitioners would not be allowed any time whatsoever for oral argument . . . even though the Court had already permitted respondent's attorney to argue . . . this Case No. 2035 without interruption.

The state appellate court passed on this federal question by denying the petition for rehearing.

The federal questions of denial of due process and denial of equal protection of the law caused by the lower state court through its action in denying defendants right to amend their

answer; denying defendants motion to dismiss because plaintiff did not come into Court with clean hands; refusing to assign a different and impartial judge; not requiring plaintiff to produce any evidence to disprove defendants' averments of facts showing fraud, misrepresentation and failure of consideration that were contained in defendants' answer; and entering summary final decree on plaintiff's motion and awarding plaintiff costs and attorneys fees with evidence in the record that plaintiff's attorney guaranteed defendants would be protected in case survey or abstract of title showed something wrong; were raised in the state appellate court upon petition for rehearing. Volume I, page 32 of the record states in part: The primary reasons petitioners are asking for reconsideration of this case is that petitioners believe they have been denied due process of law, equal protection of the laws and the right to use the Florida Co[illegible]rts all as guaranteed by the Florida and Federal Constitutions.

The state appellate court passed on these federal questions by denying the petition for rehearing.

The federal question of denial of due process caused by refusal of the state appellate court to certify evidence in the record of the state appellate court for inclusion in the record on petition to the state supreme court was raised in the state supreme court by motion for inclusion of the evidence. Volume II, page 08 of the record reads in part: These Exhibits omitted are important in that they evidence failure of consideration and fraud on the part of the respondent . . . it is asked that the omitted exhibits be inserted in the record . . . or alternatively that this Court order the Clerk of the District Court of Appeal . . . to transmit the original papers that were omitted . . .

The state supreme court by order dated October 9, 1962 (Volume II, page 12 of the record) denied the petition for writ of certiorari without acting on the motion to have these omitted exhibits entered in the certified record.

(g) There are special and important reasons why this Honorable Court should grant a review on writ of certiorari.

It is asked that this Honorable Court take judicial notice of the fact that countless thousands of persons from northern states including retirees and those considering future retirement, are being defrauded of life savings by unscrupulous swindlers in real estate transactions through deliberate misrepresentation, and that the unfortunate victims are unable to obtain relief in the Florida Courts because of outright denial of due process of law and equal protection of the law. The actions of such swindlers are concealed from the public by the rendering of so called "per curiam" opinions that contain nothing but the word "affirmed." In the present case, for example, the state appellate court rendered a one-word "per curiam" opinion denying the interlocutory appeal and thereafter rendered another one-word "per curiam" opinion affirming the action of the lower court in entering the summary final decree of foreclosure in this fraudulent real estate transaction.

It is believed that the State Courts have decided these federal questions of denial of due process and denial of equal protection of the law in ways probably not in accord with the decisions of the Supreme Court of the United States.

Decisions believed applicable under Rule 19, paragraph 1(a) are:

Brown v. *Mississippi*, 297 US 278, 56 S.Ct.461.

Lisenba v *California*, 314 US 219, 62 S.Ct.280, holding that due process of law under the Fourteenth Amendment does include a right to a fair trial;

Tumey v *Ohio*, 273 US 510, 47 S.Ct.437, holding that due process of law includes right to impartial court;

Cochran v *Kansas*, 316 US 255, 62 S.Ct.1068.

Pyle v *Kansas*, 317 US 213, 63 S.Ct.177, holding that suppression of appeal documents is violation of due process of law;

Hovey v *Elliott*, 167 U.S.409, 17 S.Ct.841, holding that due process of law signifies a right to be heard in ones defense; and that an order striking respondents' answer from the file was a denial of a hearing and in effect a denial of due process of law;

Twining v *New Jersey*, 211 U.S.78, 29 S.Ct.14, holding that due process requires that there shall be opportunity for hearing given the parties; and

Mullane v *Central Hanover B & T Co.*, 339 U.S.306, 70 S.Ct.652, holding that the due process clause requires at a minimum that deprivation of property by adjudication be preceeded by opportunity for hearing.

FRANKLIN W. DURGIN, *Petitioner*

CATHERINE DURGIN, *Petitioner*

In proper persons

APPENDIX

Chancery Order Book No. 25, Page 144

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR DE SOTO COUNTY, FLORIDA, IN CHANCERY 9709

HAL R. STOFFEL, a single man, *Plaintiff*

vs.

FRANKLIN W. DURGIN and CATHERINE DURGIN, husband and wife, *Defendants*

Order

This cause came on this day to be heard upon the plaintiff's Motion to Strike separately and severally, each and every of the paragraphs of the defendants' Answer to the plaintiff's Bill of Complaint, and the Court having heard argument and being fully advised, finds that the matters and things set forth in the defendants' Answer as a defense to the plaintiff's Complaint are, in substance, the same allegations contained in the case of Frinklin W. Durgin and Catherine Durgin, plaintiffs, vs W. R. Stoffel, Lavinia Stoffel and Hal R. Stoffel, defendants, being Chancery Case No. 9682, now pending on Appeal in the District Court of Appeal of Florida, Second District, from an order of this Court dismissing the plaintiff's Complaint with leave to amend, and that this cause should abate pending a disposition of the above styled cause in the District Court of Appeal, with the exception of the allegations of fraud, misrepresentations and concealment alleged to have been participated in by the attorney for the plaintiff, Hal R. Stoffel, which allegations the Court finds to be mere conclusions of the pleader and not supported by allegations of fact and should be stricken. It is thereupon

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion to Strike the defendant's Answer be, and the same is hereby granted with reference to all allegations of fraud, misrepresentation and concealment on the part of Lewis E. Purvis, attorney for the plaintiff, with leave granted to the defendants to amend their said Answer by alleging facts, if any there be, upon which the defendants based their conclusions of fraud, misrepresentations and concealments on the part of said attorney.

It is further ORDERED, ADJUDGED and DECREED that the remaining portions of the plaintiff's Motion to Strike and this cause of action be, and the same is hereby abated pending a disposition of the pending Appeal in the case of Franklin W. Durgin and Catherine Durgin, Plaintiffs, vs. W. R. Stoffel, et al., Chancery Case No. 9682.

DONE and ORDERED in Chambers in the City of Arcadia, DeSoto County, Florida, this 30th day of June, 1960.

/s/ JOHN D. JUSTICE
Circuit Judge

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

July Term, A. D. 1960

Case No. 2035

Not Final Until Time Expires
To File Rehearing Petition and,
If Filed, Disposed of.

FRANKLIN W. DURGIN, and CATHERINE DURGIN, *Appellants*,

v.

W. R. STOFFEL, LAVINIA STOFFEL and HAL R. STOFFEL,
Appellees.

Opinion Filed December 21, 1960

Appeal from the Circuit Court of DeSoto County: John D. Justice, Judge.

Franklin W. and Catherine Durgin, in proper person.

Lewis E. Purvis, Arcadia, for appellee.

PER CURIAM

Affirmed.

ALLEN, C. J., KANNER AND SHANNON, J. J., Concur.

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR DE SOTO COUNTY, FLORIDA, IN CHANCERY 9709

HAL R. STOFFEL, a single man, *Plaintiff*

vs.

FRANKLIN W. DURGIN and CATHERINE DURGIN, husband and wife, *Defendants*

Final Decree in Mortgage Foreclosure

This cause came on this day to be heard upon the plaintiff's Bill of Complaint, the defendants' Answer and Amendment to Answer, the plaintiff's Motion to Strike, defendants' Answer, and Motion to Strike defendants' Amendment to Answer and the plaintiff's Motion for Summary Final Decree, together with the defendants' several answers and replies to plaintiff's motions, and all parties being present and before the Court, and the Court having taken testimony and heard argument, finds that this cause was heretofore abated by order of this Court dated June 30, 1960, pending disposition of the Appeal taken in Chancery Case No. 9682 styled: FRANKLIN W. DURGIN and CATHERINE DURGIN, Plaintiffs, vs. W. R. STOFFEL, et al., Defendants, and that the issues raised by the pleadings in that cause have now been determined adversative to the defendants herein on appeal to the District Court of Appeal of the State of Florida, Second District, and by the denial of a Petition for a Writ of Certiorari to the Supreme Court of Florida and that the mandate of the Appellate Court is now on file in the said Chancery Case No. 9682; that the matters and things set forth in the defendants' Answer and Amendment to Answer do not constitute a defense to the Plaintiff's Complaint and for that reason there is no genuine issue of any material fact and the plaintiff is therefore entitled to a final decree as a matter of law based upon the pleadings, admissions and files in this cause, and the Court being other-

wise fully advised in the premises, it is thereupon, upon consideration thereof,

ORDERED, ADJUDGED and DECREED as follows:

1. That this Court has jurisdiction of this cause and of each of the parties hereto.

2. That the defendants' Answer and Amendment to Answer fail to state a defense to the plaintiff's Complaint and that there is no genuine issue of any material fact; that the equities of this cause are with the plaintiff and against the defendants and the plaintiff is entitled to the relief prayed in and by his Bill of Complaint; and that the plaintiff's Motion for Summary Final Decree be, and the same is hereby granted.

3. That the mortgage note made by the defendants to the plaintiff was duly signed, sealed, witnessed, acknowledged, delivered and recorded as alleged in and by the plaintiff's Bill of Complaint; that the plaintiff is the owner of said mortgage and of the indebtedness secured thereby; that the said mortgage and the indebtedness secured thereby is past due and subject to foreclosure and the said note and the mortgage securing the same constitute a good, valid, and subsisting lien upon the mortgaged property hereinafter described, and the terms, conditions and averments of the said mortgage are as stated in the plaintiff's Bill of Complaint.

4. That there is now due the plaintiff on account of the principal and interest on said note and mortgage, filed herein as plaintiff's Exhibits "A" and "B," the following sums, to-wit: The principal sum of Eight Thousand Six Hundred Seventeen and 50/100 ($8,617.50) Dollars, together with interest on said principle sum of six (6%) per cent from January 2, 1960 to date of this Decree, in the sum of $781.25, making total principal and interest due on the said mortgage note as of the date of this Decree in the amount of $9,398.75, together with

the sum of $26.25 due the plaintiff for money expended by the plaintiff for a continuation of Abstract of Title, as evidenced by plaintiff's Exhibit "C" filed herein, and interest on said sum from March 1, 1960 to date of this Decree in the amount of $2.12, making the total sum due for Abstract cost as of the date of this Decree in the amount of $28.37, making the total sum of principal, interest and Abstract cost due the plaintiff as of the date of this Decree, in the amount of $9,427.12, which said sum is secured by said mortgage.

5. That the plaintiff has agreed and promised to pay to his attorney of record herein for his services in and about this suit a reasonable attorney's fee to be fixed by this Court, and this Court hereby finds and decrees that $1,400.00 is a reasonable attorney's fee to be allowed the plaintiff for the services of his attorney here, which said sum is also due and owing to the plaintiff and is likewise secured by said mortgage, making a total sum of principal, interest, Abstract cost and attorney's fees due the plaintiff by the defendants herein as of the date of this Decree, a total sum of *$10,827.12*, together with all costs and expenses incurred and now are hereafter taxed in this suit including, but not limited to, Clerk's cost, Sheriff's cost, and Special Master's fees and lawful commissions in the event of a sale of the property hereinafter described, under the terms of this Decree, and the plaintiff is entitled to hold and enforce, and it is hereby adjudged and decreed that he has a lien upon the property hereinafter described, under and by virtue of said mortgage and this Decree for said sum of money hereinabove found and decreed to be due; and that said lien is prior and superior to the rights, title, interest, lien, estate, claim and demand of the defendants, and each of them, and all persons claiming by, through, under or against them, since the commencement of this suit, in and to the property hereinafter described.

6. That the property subject to the lien of this mortgage

and of this Decree, being all of the lands described and embraced in said mortgage, and set out in the Bill of Complaint herein, are particularly described as follows:

> Southeast Quarter (SE^1_4) of the Southwest Quarter (SW^1_4) and the South Half (S^1_2) of the Southeast Quarter (SE^1_4) of Section 9, Township 37 South, Range 23 East, less and except a strip of land 50 feet wide East and West off the entire East side of the above described property.

7. That the defendants pay to the plantiff the sum of $10,827.12, together with interest thereon at the rate of 6% per annum from the date of this Decree, together with all costs and expenses incurred and now or hereafter taxed in this suit, including all amounts earned by the Special Master herein appointed; for his lawful fees and commissions, within three (3) days from the making and delivery of this Decree, and that in default of such payment, the property described hereinabove be sold by the Special Master appointed by this Decree at public outcry, to the highest and best bidder for cash, before the South door of the Court House in Arcadia, DeSoto County, Florida, on Monday, the 31st, day of July, 1961, between the hours of 11:00 o'clock A. M. and 2:00 o'clock P. M.

8. That John H. Treadwell, III, an attorney at law, practicing before the bar of this Court be, and he is hereby, appointed Special Master; and that he advertise the sale of the property described herein by publishing a notice of the time and place of such sale, together with a description of the property described in this Decree, once each week for two consecutive weeks (two publications) prior to such sale, in a newspaper published in DeSoto County, Florida; and that upon such sale being made, and upon the receipt of the amount bid at such sale, the said Special Master shall execute a deed to the property conveying the property so sold; and that the

said Special Master shall disburse and apply the proceeds of such sale in the following order: (a) Costs, charges and expenses of this suit: (b) the fees and costs of the officers of this Court and of the plaintiff in this suit; (c) the sum of $1,450.00 to the attorney for the plaintiff for his services in and about the foreclosure of this mortgage; (d) the amounts herein found and decreed to be due by the defendants to the plaintiff, including interest on said sum from the date of this decree; (e) any excess or balance, if any, over and above all amounts necessary to satisfy this decree as aforesaid, be paid into the registry of this Court to await its further order and decree herein; that in case of any deficiency of such proceeds of sale, the Special Master aforesaid shall apply the same in the order specified, so far as the same will apply, making note and report of such deficiency and the amount thereof in his report to this Court.

9. That upon such sale being made the defendants herein, and each of them, and also all parties claiming an interest in the property hereinabove described by, through, under or against said defendants, or either of them, since the commencement of this suit be, and they are, and each of them is hereby, forever barred and foreclosed of and from any and all right, title, interest, lien, and equity of redemption in and to said property; and that upon the production of said Special Master's deed and a certified copy of this Decree, all persons in possession of said property, or any part thereof, shall surrender and deliver up the same to the purchaser or his agent; and that the plaintiff or any party to this suit may become a purchaser at said foreclosure sale.

10. That this Court retains jurisdiction of this cause for the purpose of making any and all further orders and decrees herein as may be mete and agreeable to equity, including the entry of an order confirming the sale hereinabove provided for, and the entry of a deficiency decree when and if such con-

firmation and the deficiency decree shall appear to be proper, upon a report of such sale by the Special Master appointed here.

DONE and ORDERED at Arcadia, DeSoto County, Florida, this 6th day of July, A.D. 1961.

/s/ JOHN D. JUSTICE
Circuit Judge

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

July Term, A. D. 1960

Case No. 2743

Not Final Until Time Expires
To File Rehearing Petition and,
If Filed, Disposed of.

FRANKLIN W. DURGIN and CATHERINE W. DURGIN, *Appellants*,

v.

HAL R. STOFFEL, *Appellee*.

Opinion filed June 6, 1962

Appeal from the Circuit Court of
DeSoto County: John D. Justice, Judge.

Franklin W. and Catherine Durgin,
in Pro Per.

Lewis E. Purvis, Arcadia, for
Appellee.

PER CURIAM

Affirmed.

SHANNON, C. J., and KANNER, and SMITH, JJ., Concur

IN THE SUPREME COURT OF FLORIDA

July Term, A. D.

Tuesday, October 9, 1962

Case No. 31,942

FRANKLIN W. DURGIN and CATHERINE DURGIN, *Petitioners*,

vs.

HAL R. STOFFEL, *Respondent*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Second District, in said cause bearing date June 6, 1962 and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

Test:

/s/ GUYTE P. MCCORD
Clerk Supreme Court